

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1206

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

SY YOAKUM GUTHRIE, III,

Defendant-Appellant.

*On Appeal from a Judgment of the United States District Court
for the Southern District of New York.*

APPENDIX FOR APPELLANT

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DOCKET ENTRIES

(pp. A1-A2)

- 4/2/76 Complaint filed, warrant issued. Defendant presented, Legal Aid assigned. Defendant released on his own recognizance.
- 4/8/76 Indictment filed, 76 Cr. 349
- 4/15/76 Deft. (Atty. present) pleads not guilty. 10 days for motions R. O. R. Case assigned to Judge Bonsal. Lasker, J.
- 5/17/76 Pre-trial hearing held 9-8-76 set for trial. Bonsal, J. 2 5-17 E 1
- 6/4/76 Filed Govt's notice of readiness for trial.
- 8/5/76 Filed indictment superseding 76 Cr 349 retaining same number as per Speedy Trial Act. Goettel, J.
- 8/12/76 Deft. (atty. present) pleads not guilty. R O R f/p. - GOETTEL J.
- 8/16/76 Filed Govt's notice of readiness for trial.
- 8/30/76 Pre-trial conference held. 11-16-76 set for trial
2 8-30 E 1
Old indictment nolleed as to defts. Guthrie & Cauble. Bonsal, J.
- 10-6-76 Filed order pursuant to Rule 17(c) of F.R.C.P. granting the U.S.A. to subpoena books, papers, documents and other objects relevant to this case...So ordered BONSAL.J.
- 10/6/76 Filed affdvt. in support of an order by the Govt. pursuant to rule 17(c) of the F.R.C.P.
- 11/4/76 Filed Govt's memo. of law re: similar acts.
- 11/10/76 Filed Govt's proposed exam. of prospective jurors.

11/16/76 Jury empanalled trial begun before Judge Gagliardi.

11/18/76 Filed transcript of record of proceedings, dated 8-30-76.

11/17/76 Jury trial begun before Judge Bonsal.

11/17/76 Trial cont'd.

11/18/76 Trial cont'd.

11/19/76 Trial cont'd.

11/23/76 Trial cont'd.

11/24/76 Trial cont'd.

11/30/76 Trial cont'd. and concluded. Ct. 6- dismissed on motion-Jury verdict deft. found guilty on cts. 1-5 incl. 1-11-77 set for sentence. Pre-sentence report ordered. Deft. R.O.R. Bonsal, J.

12/1/76 Filed Govt's request to charge.

12/1/76 Filed Govt's amended request to charge.

1/11/77 Filed Judgment (atty. Roland Thau) Cts. 1,2,3,4,5,: 2 yrs. impr. ea. ct. conc. but concs. to the term imposed in Central Dist. of California. Bail fixed pending appeal in the amount of \$10,000. PRB secured by \$1,000. cash. Deft. is given 15 days to post bail and is cont'd on his own recognizance until then. Bonsal J. issued all copies.

1/20/77 Filed deft's notice of appeal from judgment of 1-11-77. Mailed copies.

2-9-77 Filed transcripts dated 11/16, 11/17, 11/18, 11/19 11/23/ 11/24/76

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

SY YOAKUM GUTHRIE III,
RICHARD MANSFORD CAUBLE,
HARRY GOLDBERG,
STANLEY JEROME SILVER,
a/k/a "Jerry Silver",
WILLIAM EVRETT GLASS, and
FREDERIC WOHLFELD,

Defendants.

INDICTMENT

S 7C Cr. 349 (D9)
(Superseding 6
Cr. 349)

COUNTS ONE AND TWO

The Grand Jury charges:

On or about the dates set forth in Counts One and Two below, in the Southern District of New York and elsewhere, defendants GUTHRIE, CAUBLE, GOLDBERG and SILVER, together with their confederates, unlawfully, wilfully and knowingly having devised and intending to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises relating to Edward Fucillo and Madison Investment Corporation, did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce certain writings, signs, signals, pictures and sounds, as set forth below, for the purpose of executing such scheme and artifice:

Count	Approximate Date	Matter in Interstate Commerce
1	December 5, 1975	Wire transfer of \$3750 from the Citizens Commercial Bank of Tallahassee, Florida to the account of United Housing Corporation at American Bank and Trust Company, New York, New York.
2	December 10, 1975	Wire transfer of \$2500 from the Citizens Commercial Bank of Tallahassee, Florida to Chemical Bank, New York, New York.

(Title 18, United States Code, Sections 1343 and 2.)

COUNTS THREE THROUGH FIVE

The Grand Jury further charges:

On or about the dates set forth in Counts Three through Five below, in the Southern District of New York and elsewhere, defendants GUTHRIE, CAUBLE, GOLDBERG, SILVER, GLASS and WOHLFELD, together with their confederates, unlawfully, wilfully and knowingly having devised and intending to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises relating to David F. Wilson and Broward Convalescent Home, Inc., did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce certain writings, signs, signals, pictures and sounds, as set forth below, for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Sections 1343 and 2:

<u>Count</u>	<u>Approximate Date</u>	<u>Matter or Person in Interstate Commerce</u>
3	December 3, 1975	Telephone conversations between David F. Wilson and K.P. Jones, in Fort Lauderdale, Florida and SILVER and United Housing Corporation, in New York, New York.
4	December 11, 1975	Wire transfer of \$5000 from the First National Bank in Fort Lauderdale, Florida to United Americas Bank, New York, New York.
5	December 16, 1975	Telephone conversation between GUTHRIE in New York, New York and David F. Wilson and K.P. Jones in Buena (Vineland), New Jersey concerning delivery of a "financial guarantee bond".

(Title 18, United States Code, Sections 1343 and 2.)

FORTRAN

ROBERT H. WISSE, JR.
United States Attorney

BEST COPY AVAILABLE

11/30

A5

US v.
Guthrie

CHARGE OF COURT AND EXCEPTIONS

1116

1 jpsr

Bonsal

[In open court; jury present:]

Tk.6b.2

THE CLERK: The Court will now charge the jury. Spectators may leave now or remain seated until the completion of the charge. Lock the door, please, Marshal.

C H A R G E O F T H E C O U R T

THE COURT: Mr. Foreman, as you are, Mr. Whitcup, by virtue of occupying the first chair, and ladies and gentlemen of the jury, first I'd like to join the lawyers in thanking each of you for the care and attention which you have shown throughout this trial. I tell you I appreciate the sacrifices I know each of you have been called upon to make in your own personal lives so you could serve in this very important public capacity of being on a Federal jury. I am sure you will bear with me and give me the same degree of attention that you have shown throughout so that you may under the principles of the law which apply to this case. You remember I told you at the outset that it was your duty here to weigh the evidence calmly and impartially without any sympathy and without any prejudice for or against either the Government or this defendant. I told you that everyone appearing before this bar of justice is entitled to an absolutely fair and impartial trial regardless of his

1 2 jpsr

2 occupation or his station in life. I told you that your
3 verdict must be based solely on the testimony that you
4 heard from that witness stand and on the exhibits which
5 were received in evidence and on nothing else at all.

6 I also told you at the outset that it was
7 my function here to instruct you as to the law which
8 applies here and on the law you must accept my instruc-
9 tions. But you, the jury, are the sole judges of the
10 facts. It is not what a lawyer says a witness testified
11 to or what a lawyer says the document contains or shows
12 or what I say on these subjects. It is what you, the
13 jury, remember and decide.

14 I told you also at the outset during the trial
15 you observed me having conversations with one or the other
16 lawyers, indeed I did. I sustained objections and I
17 overruled them. Ladies and gentlemen, draw no inference
18 from anything that I may have said during this trial that
19 might lead you to think that I favor one side or the
20 other here because of course, I do not. That is not my
21 province following your deliberations.

22 Now, throughout this charge, ladies and
23 gentlemen, I will instruct you that you may not convict
24 this defendant, Mr. Guthrie, unless and until you are
25 satisfied that the Government has proven each element

1 3 jpsr

2 comprising the crimes charged beyond a reasonable doubt.

3 What do I mean by this question beyond a
4 reasonable doubt? Well, of course, the words themselves
5 suggest the answer. It is a doubt based on reason. It is
6 a doubt which a reasonable man or woman would entertain.
7 But a reasonable doubt is not a fanciful doubt, it is not
8 an imaginary doubt. It is not a doubt that a juror might
9 conjure up in order not to perform an unpleasant task. It
10 is a reasonable doubt. It is a doubt which arises in a
11 juror's mind because of something in the evidence in the
12 case or the absence of evidence in the case. It is the
13 kind of doubt which can cause a reasonable man or woman
14 and in a more serious and important matter in his or
15 her own life to hesitate to act. The burden is on the
16 Government to prove the guilt of the defendant beyond
17 a reasonable doubt.

18 The Government need not prove guilt beyond
19 all possible doubt. If that were the rule, few people
20 however guilty they might be, would ever be convicted.
21 In this world of ours, it is practically impossible for
22 one to be absolutely and completely convinced of any
23 controverted fact which by its nature is not susceptible
24 to mathematical precision or to mathematical certainty.
25 So, the law is that it is sufficient if the Government

1 4 jpsr

2 has proved the guilt of a defendant beyond a reasonable
3 doubt, not beyond all possible doubt.

4 When I review the indictment with you,
5 ladies and gentlemen, I will remind you, as I told you
6 at the outset, that the indictment is merely the way
7 by which the Government calls into court individuals it
8 claims are violating the law. I told you and I repeat, an
9 indictment is not evidence of the guilt of this defendant.
10 Nor does it detract in any way from the presumption of in-
11 nocence from which the law surrounds this defendant
12 until his guilt is proven.

13 Now, this presumption of innocence, ladies and
14 gentlemen, remains with this defendant, Mr. Guthrie, and
15 applies to the consideration of each of the essential
16 elements of the crimes charged. This presumption of in-
17 nocence remains unless and until you, the jury, are
18 satisfied that the Government has proved the guilt of the
19 defendant beyond a reasonable doubt.

20 The defendant here has pled not guilty and by
21 so doing he's put in issue every material element of the
22 charges here made and if the Government has not proved
23 to you that the defendant is guilty beyond a reasonable
24 doubt, then, of course, it is your duty to find the
25 defendant not guilty.

1 5 jpsr

2 This morning the lawyers have marshalled the
3 evidence in this case in great detail and it is not my
4 intention to review all that again. During my charge, I
5 may mention what I understand to be some of the contentions
6 and I am doing this only in the thought that it might
7 help you in your own recollection. Because it is what
8 you remember and decide which is that which controls and
9 not what they have said or I might have said.

10 This has been a short trial, ladies and
11 gentlemen. But on the other hand it stretched over on
12 account of the Thanksgiving holiday and for one reason or
13 another, it stretched over a little period of time. I
14 thought it might just help you if I very briefly listed the
15 several witnesses whom you heard in the order in which
16 they testified from that witness chair.

17 [Continued on next page.]
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A10

Guthrie

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1 hpsr

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The first witness, as I remember it, was Edward Fucillo. I think his testimony has been discussed in considerable detail here this morning. As I recall it he was looking for financing for a group of people who had some land in Tallahassee, Florida. The next witness was Jack Smith who came from Palm Beach as I recall it. He testified, I believe, about he was interested in financing, and I think there was some suggestion that maybe he could get his financing with Fucillo.

The next three witnesses were William Glass, Jerry Silver, and Richard Cauble who testified about conversations, what they saw and did. Again, their testimony has been gone into considerable detail by the lawyers.

Then there was David Wilson. He was the man from Fort Lauderdale, Florida, who was trying to get financing for his Broward Convalescent Home, he told us about his meetings and what happened.

The final witness was Mr. Kay Jones who as I recall it was Mr. Wilson's lawyer who accompanied him to Vineland, and New York on two occasions.

The defendant produced no witnesses and he is not required to. That is not for your consideration at all because I have told you the Government here has the

1 2 hpsr

2 burden of proof, the burden of proving the defendant
3 guilty beyond a reasonable doubt and the defendant is
4 not required to prove his innocence

5 The statute involved here on all counts, and
6 there are five counts, the same statute is involved in all
7 of them, Section 1343 of Title 18 of the United States
8 Code. This statute provides in relevant part that whoever
9 having devised a scheme or artifice to defraud or for
10 obtaining money or property by means of false or fraudulent
11 pretenses, representations or promises transmits --
12 and this is the part that makes it a Federal crime as
13 distinguished from a State crime -- transmits or causes
14 to be transmitted by means of wire communication in
15 interstate commerce -- all that means is a wire communi-
16 cation from one State to another, like from Florida to
17 New York -- for the purpose of executing such a scheme
18 or artifice, is guilty of a crime. So that, in a nut
19 shell says that if a person does devise a scheme to
20 defraud and in furtherance of that scheme he uses these
21 interstate facilities like wire, telephone, then he is
22 guilty of a Federal crime.

23 Now, here the Government as I understand it
24 contends that in each of the five counts in this indict-
25 ment, that the defendant did devise a scheme to defraud

1 3 hpsr

2 people who were seeking financing by promising them what
3 I think is called financial guarantee bonds and had no
4 intention of ever delivering them. And in connection
5 with that, collecting advanced payments for obtaining
6 these financial guarantee bonds which they didn't intend
7 to deliver.

8 The defendant denies this. He denies that he
9 devised or participated in any schemes or fraud and as
10 I understand it, he contends that he was trying in good
11 faith to obtain the financial guarantee bonds for these
12 people.

13 The first two counts of the indictment relate
14 to the Fucillo transaction of which you have heard a great
15 deal of testimony. The remaining three counts relate
16 to the Wilson transaction. And each of the counts
17 relates to a different wire or telephone conversation.

18 In Counts One and Two, the Grand Jury charges
19 on or about the dates set forth in Counts One and Two
20 below, in the Southern District of New York and elsewhere
21 -- I think most of the testimony you have heard was in
22 Manhattan, the Southern District of New York -- the
23 defendants Guthrie, Cauble, Goldberg and Silver -- of
24 course Guthrie is the only one here that is involved;
25 Cauble and Silver testified, but Guthrie is the only one

1 4 hpsr

2 who is here on trial, and I want to ask you draw no
3 inference whatsoever, favorable or unfavorable with
4 respect to Mr. Guthrie by reason of the fact that these
5 other people are named in the indictment and indeed
6 Cauble and Silver testified at this trial. Draw no
7 inference with respect to Mr. Guthrie because they are
8 named in here. Now, the indictment goes on: unlawfully,
9 wilfully and knowingly having devised and intending to
10 devise a scheme, an artifice to defraud and for
11 obtaining money and property by means of false and
12 fraudulent pretenses, representations and promises
13 relating to Edward Fucillo and Madison Investment Corpora-
14 tion, which I believe is a corporation Mr. Fucillo tes-
15 tified about, did transmit and caused to be transmitted
16 by means of wire communications in interstate commerce
17 -- here there wasn't foreign commerce -- certain writings,
18 signs, signals, pictures and sound set forth below for
19 the purpose of executing such scheme and artifice.

20 I will send you this indictment in when you
21 deliberate. In so doing, my word is not any evidence
22 at all but it will help you keep track of the five counts
23 and the instance to which they refer and that is really
24 the sole purpose of doing it.

25 In Count One, the approximate date, December

1 5 hpsr
2 5, 1975 -- there is nothing sanctified about that date but
3 it has to be around that time -- matter in interstate
4 commerce, wire transfer of \$3,750 from the Citizens of
5 Commercial Bank of Tallahassee Bank of Florida Bank to
6 the account of United Housing Corporation and American Bank
7 & Trust Company, New York, New York. I think there was
8 **testimony** about this. I think Mr. Fucillo testified
9 about it. Then I think this Exhibit 155, if I remember
10 correctly, which the Government introduced, the Govern-
11 ment represented a wire transfer. That is the first
12 count.

13 Count Two, there the date is given as
14 December 10, 1975: Wire transfer of \$2,500 from the
15 Citizens Commercial Bank of Tallahassee, Florida, to
16 Chemical Bank, New York.

17 [Continued on next page.]
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7b a.m.

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hpas

I believe again there was testimony from Fucillo about this, and that the document itself is Exhibit 154.

Then we go on to counts 3 to 5. The introduction of these counts is just the same as counts 1 and 2 and I won't read that again.

Count 3, the approximate date is December 3, 1975, and that refers to a telephone conversation between David E. Wilson and Kay P. Jones in Fort Lauderdale, Florida, and Silver and United Housing Corporation, in New York. I think there, there was testimony of Mr. Wilson about this telephone call and it may be there are also telephone slips in that connection.

Count number 4, December 11, 1975, wire transfer of \$5,000 from the First National Bank in Fort Lauderdale, Florida, to United Americas Bank, New York, New York. Here again, Mr. Wilson testified about that and I think Mr. Glass testified about it and as I recall it, Exhibit 157 is the notice of the transfer of the money to Mr. Wilson.

And then, finally, count 5, dated December 16, 1975, telephone conversation between Guthrie and New York, New York, and David Wilson, and Kay P. Jones, Vineland, New Jersey, concerning delivery of a financial guarantee

1 2hpas

2 bond. I think this telephone conversation was testified
3 to by Wilson and also by Mr. Jones, I think, his lawyer,
4 when they were down in Vineland.

5 With respect to each of these five counts,
6 ladies and gentlemen, there are three elements which the
7 government must prove, and they must prove each of these
8 elements beyond a reasonable doubt. The first element is
9 that the defendant devised or participated in a scheme to
10 **defraud** or to obtain money by false or fraudulent pretenses,
11 representations or promises.

12 Second, that in furtherance of this scheme to
13 defraud, the defendant caused the use of an interstate
14 wire facility or telephone.

15 Now, on that one, there is no evidence, as I
16 recall, ~~that~~ on these wire transfers of money that the
17 defendant had anything to do with it. The issue there is
18 whether the existence of this scheme brought about the use
19 of the wire by these people, whether you want to call them
20 victims or whatnot. In other words, under the law, it is
21 either the person does it directly or he causes somebody
22 else to do it, but in either way, it must be in furtherance
23 of this scheme to defraud.

24 Third, that the defendant acted unlawfully,
25 wilfully and knowingly and with the specific intent to

1 3hpas

2 defraud.

3 First of all, what is a scheme to defraud?
4 Well, of course, it's merely a plan. It's a plan to do
5 something that is illegal, a plan in which the defendant
6 either devised himself or knowingly participated with
7 others to obtain money from other people by false and
8 fraudulent representations, pretenses, promises.

9 Here the government charges that Mr. Guthrie
10 and others did participate in such a scheme to defraud
11 people who needed money, needed it quickly, for one project
12 or another, and that they did so by false promises that
13 they could obtain financial guarantee bonds.

14 The government contends pursuant to this
15 scheme the defendant and the others defrauded Mr. Fucillo
16 and Mr. Wilson, obtaining money from them in the form of
17 advanced payments for these financial guarantee bonds,
18 and they did so by false pretenses, representations and
19 promises.

20 Of course, the defendant, Mr. Guthrie, denies
21 this, denies these contentions. Again, he denies there
22 was any scheme here which he devised or participated in
23 to defraud Mr. Fucillo or Mr. Wilson or, if there was any
24 such scheme, that he didn't have any part to play in it.

25 You will recall that during the trial I

1 4hpas

2 received certain evidence subject to connection. For
3 instance, the first witness, Mr. Fucillo, testified about
4 discussions of Mr. Cauble and Mr. Glass at which
5 Mr. Guthrie was not present. Then there was an Exhibit 1,
6 I think an agreement between Fucillo, which was signed by
7 Jerry Silver, covering that \$7,500 deposit. I don't
8 recall any evidence that Guthrie was there. I received
9 that evidence subject to connection.

10 What did I mean by that? The connection that
11 I had in mind before you considered this evidence with
12 respect to Mr. Guthrie, you must first find that the
13 government has proven beyond a reasonable doubt that there
14 was a schere to defraud here and that Mr. Guthrie, the
15 defendant, was a knowing participant in that scheme.
16 And if the government has proved that, then this evidence
17 may be considered by you because the defendant, Mr. Guthrie,
18 would be equally responsible for anything that was done
19 in furtherance of the scheme.

20 So, consider the evidence, ladies and gentlemen,
21 and determine whether the government has proven to you
22 beyond a reasonable doubt whether the defendant devised
23 or participated with others in devising a scheme to
24 defraud. That is the first step.

25 Now, as to the second element, and I touched

1 5hpas

2 on this already, that requires the government must prove
3 beyond a reasonable doubt that in furtherance of the
4 scheme to defraud, the defendant caused the use of a
5 wire facility or telephone, the things I have read to you
6 in the indictment. Here the government must prove that

7 Mr. Fucillo did transfer money by wire in counts 1 and
8 2 and Mr. Wilson transferred money by wire in count 4 from
9 the banks in Florida and Banks in New York, and in addition
10 the government must prove beyond a reasonable doubt that
11 the defendant, Mr. Guthrie, caused these wire transfers
12 to be made.

13 And I covered that if you find there was a
14 scheme and these wire transfers were in furtherance of the
15 scheme, then you may find that the defendant caused the
16 wire transfers to be made. But, on the other hand, if
17 you don't find a scheme here, or, if you do, the transfers
18 were not in furtherance of the scheme, then, of course, you
19 must find the defendant not guilty on that particular
20 count.

21 Then with respect to the second count, ladies
22 and gentlemen. That is the \$2,500 count. You will recall
23 there was testimony at the trial that Mr. Fucillo gave
24 Mr. Cauble \$2,500 in cash and Mr. Fucillo later received
25 \$2,500 by wire from his partners in Florida. In other

6hpas

words, he sent down for reimbursement for the \$2,500 he had paid in cash. Again, if you find that this was brought about by the defendant and it was in furtherance of a scheme to do this, then you may consider all the evidence in determining whether defendant is guilty on the second count. But, if you find this wire transfer was not in furtherance of the scheme, then you will find the defendant not guilty on that count.

8a a.m.

17

A21

1 jpas

2 Now, these same principles apply, ladies and
3 gentlemen to the wire counts and also to the telephone
4 count, count 5. That telephone conversation, was it in
5 furtherance of the conspiracy here?

6 Because of what I have told you, it was
7 immaterial, if you find that the defendant did devise or
8 participated in the scheme and these wire communications
9 were in furtherance of it, it is quite immaterial that he
10 happened to know it would be a telephone call, wire
11 transfer, whether it occurred and if it was done by others;
12 but if it was done in furtherance of the scheme, as I
13 mentioned to you, he would be responsible.

14 So much for the first two **elements**.

15 The third element is a vital element which
16 the government must also prove beyond a reasonable doubt.
17 That is, the defendant's knowledge and intentions;
18 Mr. Guthrie's knowledge and intentions at the time of
19 these transactions. Did he have a criminal intent? Did
20 he intend to violate the law?

21 Now, an act is done wilfully and knowingly
22 if it is done voluntarily and purposely. An act is done
23 unlawfully, wilfully and knowingly if it is done with
24 an evil motive or a criminal purpose. An act may be done
25 unlawfully and wilfully and knowingly if it is done with

1 2jpas

2 a deliberate disregard of whether the statements or
3 representations made were true or false or with a
4 conscious purpose to avoid learning the truth.

5 An act is not done unlawfully, wilfully and
6 knowingly if you find that it is done by **mistake or**
7 carelessness or other innocent reasons.

8 Obviously, it is impossible to prove exactly
9 what Mr. Guthrie knew or what his intentions were on
10 these occasions of which you have heard evidence. We can't
11 look into his mind and see what knowledge he had at the time
12 to determine his specific intention. But these are matters
13 which you, the jury, can determine from a careful con-
14 sideration of the facts and circumstances that were brought
15 out in the evidence.

16 The knowledge and intent, wilfulness, if you
17 will, of a defendant, may only be understood when put in
18 context of the circumstances surrounding his acts and the
19 inferences which you, the jury, find may be reasonably
20 drawn therefrom.

21 You might ask yourselves whether you think
22 these transactions were normal or abnormal and whether
23 they were surreptitious and whether you think the back-
24 ground of the defendant made it likely or unlikely that
25 he fully understood what he was doing. Whether you think

1 3jpas

2 the defendant had a motive, whether you think he had a
3 financial or other interest in the outcome; now, these
4 are the kind of questions and, of course, not the only
5 ones, that you should ask yourselves in order to determine
6 the knowledge and intentions of the defendant.

7 I don't suggest any answers to these
8 questions because, after all, in your own daily lives
9 you are continually called upon to use your own common
10 sense and experience to determine from the actions or
11 statements of others what their real intentions and
12 purposes are. Please do exactly the same thing here.

13 Now, in connection with whether the defendant
14 acted knowingly, wilfully and unlawfully, the government
15 must prove here and, again, prove beyond a reasonable
16 doubt, that Mr. Guthrie acted with specific intent to
17 defraud. In other words, you must find here that the
18 government has proved beyond a reasonable doubt that he
19 was acting with a specific intent to defraud people, such
20 as Mr. Fucillo and Mr. Wilson, for the purpose of some
21 financial gain to himself and, of course, relatively
22 resulting loss to those who were defrauded.

23 Now, of course, here mere knowledge that
24 others may have been involved in such a scheme is not
25 **enough** or mere presence with other people whom you think

1 4jpas

2 were engaged in such a scheme is not **enough**.

3 You must find here that he was a knowing
4 participant and knew what he was doing and that he had a
5 specific intent to defraud.

6 So, consider the evidence here, ladies and
7 gentlemen, and find whether the government has proven this
8 beyond a reasonable doubt. If, of course, after consider-
9 ing the evidence, you conclude that the defendant here was
10 acting in good faith, then, of course, he didn't devise
11 a scheme. Then you would find him not guilty.

12 On this issue of good faith, if you think there
13 was good faith, the government then again has the burden
14 of proof of proving beyond a reasonable doubt that the
15 defendant acted here with a specific intent to defraud
16 and did not act in good faith.

17 In other words, that the defendant knowingly
18 participated in this scheme and sought to make it
19 successful.

20 Now, it is quite immaterial if you find there
21 was a scheme to defraud **it was quite immaterial**
22 whether it was successful or not successful. It is also
23 immaterial that there was some evidence about that, that
24 if there was such a scheme, it is immaterial whether the
25 participants in the scheme ever intended to make

1 5jpas

2 restitution or not. There was some evidence about that.

3 Again, that is immaterial.

4 Then you will recall, ladies and gentlemen,
5 I think it was right at the end of the trial that the
6 parties entered into a stipulation that Mr. Guthrie was
7 convicted on January 19, 1976, after trial in December of
8 1975 in the United States District Court for the Central
9 District of California of the crimes of conspiracy in
10 violation of Section 371 of the United States Code,
11 interstate transportation of stolen property in violation
12 of Section 2314, and aiding and abetting in violation of
13 Section 2, and that said convictions are presently on
14 **appeal** in California.

15 Now, of course, I mentioned that at the time --
16 and I will repeat now -- Mr. Guthrie is not charged with
17 any of these crimes here. Therefore, this evidence may
18 be considered by you only for one single purpose, and
19 that is, the issue of the defendant's knowledge and
20 intention when he did the things which you have heard
21 testimony about. You will consider it only for that,
22 knowledge and intent, and for no other purpose at all.

23 In considering the evidence, ladies and
24 gentlemen, the law recognizes two types of evidence,
25 direct evidence and circumstantial evidence.

6jpas

Direct evidence is the testimony of a witness who tells us what he saw and what he did. Circumstantial evidence consists of circumstances in which the jury may infer by a process of reasoning certain facts which are sought to be established as true.

The classic example of circumstantial evidence is, you happen to go home yesterday during the snow storm and you went in your house or apartment and somebody was watching TV there and they looked at you and noticed your hat and coat were white. They would have said, "It's snowing outside." They wouldn't have looked outside. They would look at you and by a process of reasoning know that it would be snowing outside. That is circumstantial evidence.

Circumstantial evidence is good evidence and no greater degree of certainty is required when it is circumstantial and when it is direct. But in either event, the government must have proved to you the guilt of the defendant beyond a reasonable doubt.

And different inferences may be drawn from the evidence whether it is direct or circumstantial. The government asks you to draw one set of inferences while the defendant asks you to draw another. But it is for you, the jury, alone, to decide what inferences you will draw from the evidence and what facts you find to have been

1 7jpas

2 proved. But these inferences must be reasonable inferences
3 based on the evidence or lack of it.

4 The point was made in the summations this
5 morning, I think Mr. Thau mentioned Mr. Wohlfeld and
6 Mr. Kaplan mentioned Mr. Goldberg, who you heard of during
7 the trial and did not appear as witnesses here. The point,
8 I think, was made about that. As far as I know, I suppose
9 these witnesses could have been called by either side.
10 If you find that a witness was available to both the
11 government and to the defendant and both sides failed to
12 call that witness, you may infer, you may draw the inference
13 that the testimony of that witness might have been
14 unfavorable either to the government or to the defendant
15 because it is equally within your discretion to draw no
16 inference at all in the failure of either side to call
17 these witnesses.

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Guthrie

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1 jpsr

1
2 You, the jury, of course, are the sole judges
3 of the credibility of the witnesses who appeared before
4 you. I know you paid very careful attention to their
5 testimony. Of course, it is the quality of the testimony
6 and not the quantity of it. That is the testimony that
7 you, the jury, represents the true picture of what happened
8 here.

9 How do you determine credibility of these
10 witnesses? Well, here, again, ladies and gentlemen,
11 just use your plain everyday common sense. You saw them.
12 How did their stories impress you? Did you think they
13 testified frankly, candidly and fairly? So, apply your
14 common sense and experience just as you are called upon
15 to do in your own lives when you have to decide whether
16 you have been given a true picture of a given situation.

17 I think you may consider a witness' demeanor,
18 his background, his occupation or business, his prior
19 criminal record if he has one. You can consider a witness'
20 candor or lack of it, a witness' possible bias, his
21 means of information and the accuracy of his recollection.
22 You can consider whether you find a witness' testimony
23 to be supported or whether you find it to be contradicted
24 by other testimony or circumstance.

25 Now, you heard the testimony here again of
Messrs. Glass, Cauble and Silver and they testified

1 2 jpsr

2 that they pled guilty to some of these charges as I recall
3 it in one way or another. I think some of them also
4 said that they had lied to the Grand Jury. Also, as
5 I read the indictment the Government is claiming they
6 were the accomplices in this scheme to apparently set
7 this trap.

8 They all testified for the Government and of
9 course you may consider whether they testified in hope
10 of leniency. The need is especially great to scrutinize
11 their testimony if you find that their testimony was not
12 corroborated by any other evidence. You should give
13 that testimony such value and weight that you deem proper
14 under all the circumstances. The testimony of an ac-
15 complice by itself may be sufficient to convict if you
16 believe it and if it convinces you of the guilt of the
17 defendant beyond a reasonable doubt. But in considering
18 their testimony, do take into account any motive which
19 you find they had such as an agreement or arrangement
20 with the Government and subject their testimony to care-
21 ful and searching scrutiny.

22 A witness may be discredited or impeached
23 by contradictory evidence or by evidence that he made
24 different statements at some other time or place. If
25 you find that a witness was lying to you, ladies and

1 3 jpsr

2 gentlemen, you can reject that witness' testimony. You
3 can accept part of his testimony if you think it is
4 reliable and you can reject the rest.

5 Mr. Guthrie did not take the stand at this
6 trial. I think that Mr. Thau alluded to that. Of
7 course, the fact that he didn't take the stand must not be
8 considered by you as any evidence against him or the
9 basis of any presumption or inference unfavorable to him.
10 Don't let this enter into your deliberations. Don't
11 let it sway your minds to the slightest degree. This is
12 because, and I repeat again, the Government has the burden
13 of proving the defendant guilty beyond a reasonable doubt.
14 The defendant is not required to prove his innocence.

15 Now, as I have told you, a separate crime
16 was charged in each of the five counts of the indictment
17 and the evidence applicable to it must be considered by
18 you separately. The fact that you find a defendant
19 guilty on one count does not control your verdict with
20 respect to the remaining counts.

21 You have the right to see the exhibits which
22 have been received in evidence. If you want to see any
23 of these exhibits, just let the marshal know and you
24 let me know and we will send them to you.

25 As you deliberate, ladies and gentlemen, you

4 jpsr

1 remember that a jury deliberation is one in which everyone
2 participates and exchanges views. Don't be afraid to
3 change your original view because of pride of opinion or
4 stubbornness or for any other reason should you become
5 convinced that your original view was wrong.
6

7 On the other hand, ladies and gentlemen, never
8 surrender your honest conviction about the case. Never
9 surrender that. Regardless of whether you are out-
10 numbered by the opinions of your fellow jurors. Never
11 surrender your conscientious conviction.

12 Seek to arrive at a verdict provided you can
13 do this reasonably and consistently with the reasonable
14 and conscientious opinions by all of you. It is important
15 to the Government that this case be decided by you.

16 This being a criminal case, your verdict must
17 be a unanimous verdict, a verdict reflecting the con-
18 scientious convictions of each and every one of you.

19 If after you have considered the evidence,
20 ladies and gentlemen, you find that the defendant is not
21 guilty, you must not hesitate for any reason to render
22 a verdict of not guilty. But on the other hand, if you
23 find that the law has been violated by the defendant as
24 charged, you must not hesitate to render a verdict of
25 guilty because of sympathy or any other reason at all.

1 5 jpsr

2 Please do not consider the question of possible punish-
3 ment if you should find the defendant guilty. Please
4 don't let this enter into your deliberations in any
5 way. That duty rests on the Court. You must not allow
6 consideration of possible punishment to affect you or make
7 you seek to avoid the performance of an unpleasant task.

8 Finally, ladies and gentlemen, I am sure that
9 if you listen to your fellow jurors here and if you
10 apply your common sense, you will reach a fair verdict
11 here. Now, I remind you again, that verdict must be
12 rendered without fear, without favor, without prejudice
13 and without sympathy.

14 Counsel come forward a minute.

15 [At the side bar:]

16 THE COURT: Exceptions?

17 MR. THAU: Your Honor, I take exception to
18 your Honor's statements concerning Counts One and Two,
19 if you don't find a scheme or if you find that the re-
20 mittance was not in furtherance of the scheme then you
21 must acquit and similarly concerning Count Two.

22 Now, as I read your Honor's phrasing, it
23 suggested to me that this jury has to make an affirmative
24 finding that there was no scheme or to make an affirma-
25 tive --

1 6 jpsr

2 THE COURT: Well, you have an exception to that.

3 MR. THAU: My point is that the way it should
4 have been worded, if you have a doubt there was a scheme
5 or if you have a doubt --

6 THE COURT: You probably could improve it a
7 great deal and you have an exception.

8 MR. KAPLAN: Your Honor, if I can make just
9 a couple points. At one point you said deliberate dis-
10 regard and conscious purpose and I believe it should be an
11 and and not an or.

12 THE COURT: I won't correct it but you have an
13 exception about it.

14 MR. KAPLAN: My exceptions aren't worth very
15 much.

16 MR. THAU: If a question is asked concerning
17 it later, I think Mr. Kaplan's language should be
18 adopted. Right now I don't think it is important.

19 THE COURT: I won't.

20 MR. KAPLAN: The only other point, I think
21 under the Geaney standard, your Honor should have made
22 a finding of connection and given the evidence to the
23 jury --

24 THE COURT: You're talking about on subject to
25 connection?

1 7 jpsr

2 MR. KAPLAN: Yes.

3 THE COURT: I don't do all that.

4 [In open court:]

5 THE COURT: My three alternates, you have
6 served the entire portion of the trial and it is my
7 duty to discharge you now. I want to thank you very much,
8 if any of the rest of you were not available it would
9 have been unfortunate not having you. I would like to
10 thank you for your service: You may return back to the
11 central jury part and they will give you your certificate
12 of service.

13 Thank you very much.

14 I will ask Mr. Wallace to make a this copy
15 of the indictment and give it to the foreman. Mr.
16 Foreman, your verdict will be guilty or not guilty on
17 Counts One through Five.

18 [Court's Exhibit 1 is marked.]

19 [Marshal sworn by the Court Clerk to
20 guard the jury.]

21 THE COURT: Ladies and gentlemen, you may
22 retire and I hope your sandwiches are there.

23 [Jury deliberations commenced at 1:45 p.m.]

24 THE COURT: Gentlemen, I have a ceremony for
25 Judge Broderick at 2:15 and it will take about twenty

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

SY YOAKUM GUTHRIE, XXX III
Defendant-Appellant

On Appeal from a judgment of the U.S. DI
Dist. Court for the So. Dist of N.Y.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 29th day of July 1977 at One St Andrews Plaza
New York, New York
deponent served the annexed upon

Appendix

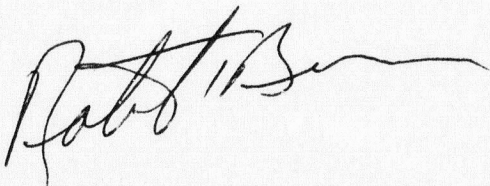
~~Brief~~

Robert Fiske

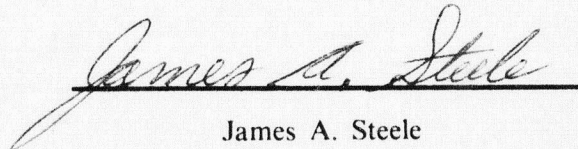
U.S. Attorney So. Dist.

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 29th
day of July 19 77



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979


James A. Steele